

THOMAS J. FITZGERALD

IBLA 84-692

Decided July 5, 1985

Appeal from a decision of the Director of the Lexington Field Office, Office of Surface Mining Reclamation and Enforcement, denying a citizen's complaint calling for Federal inspection and enforcement action against Meshack Coal Company, Strata Coal Company, San-Am Coal Company, and Maple Creek Mining Company.

Reversed; inspections ordered.

1. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures:  
Generally -- Surface Mining Control and Reclamation Act of 1977: Inspections:  
Generally -- Surface Mining Control and Reclamation Act of 1977: Public Health and Safety: Imminent Danger -- Surface Mining Control and Reclamation Act of 1977:  
Temporary Relief: Significant, imminent Environmental Harm

Where a state has acquired primacy over the regulation of surface mining operations within the state, the Office of Surface Mining Reclamation and Enforcement is required to conduct an immediate Federal inspection on the basis of a citizen's complaint under 30 CFR 842.11(b)(1) only if the person requesting the inspection provides adequate proof that an imminent danger exists and that the state regulatory authority has failed to take appropriate action.

2. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures:  
Generally -- Surface Mining Control and Reclamation Act of 1977: Inspections:  
Generally -- Surface Mining Control and Reclamation Act of 1977: Public Health and Safety: Imminent Danger -- Surface Mining Control and Reclamation Act of 1977:  
Temporary Relief: Significant, Imminent Environmental Harm

Where a person requesting a Federal inspection pursuant to 30 CFR 842.11(b)(1) is required to furnish adequate proof that an imminent danger exists, he does not have an obligation to provide proof that an operation affects more than 2 acres, because the burden of proving an exemption from the Act rests upon the party asserting the exemption.

3. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures:  
Generally -- Surface Mining Control and Reclamation Act of 1977: Inspections:  
Generally -- Surface Mining Control and Reclamation Act of 1977: Public Health and  
Safety: Imminent Danger -- Surface Mining Control and Reclamation Act of 1977:  
Temporary Relief: Significant, Imminent Environmental Harm

A State regulatory authority has failed to take appropriate action against a surface coal mining operator creating an imminent danger when it has been enjoined by a State court from taking enforcement action determined necessary to secure abatement of the violation.

4. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures:  
Generally -- Surface Mining Control and Reclamation Act of 1977: Inspections:  
Generally -- Surface Mining Control and Reclamation Act of 1977: Public Health and  
Safety: Imminent Danger -- Surface Mining Control and Reclamation Act of 1977:  
Temporary Relief: Significant, Imminent Environmental Harm

Departmental regulation 30 CFR 842.11(b)(1) does not authorize OSM to postpone an inspection required by that provision until it conducts a reclamation fee compliance audit of the alleged violators.

APPEARANCES: Thomas J. FitzGerald, Esq., Frankfort, Kentucky, pro se; Glenda Hudson Owens, Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

#### OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Thomas J. FitzGerald has appealed from the June 4, 1984, letter decision of the Director of the Lexington, Kentucky, Field Office, Office of Surface Mining Reclamation and Enforcement (OSM), denying his request for Federal inspections and enforcement action against Vernon Morris, d/b/a Meshack Coal Company; Mike Baker, d/b/a Strata Coal Company; Johnny Jones, d/b/a San-Am Coal Company; and Ed Goff, d/b/a Maple Creek Mining Company. By letter dated May 14, 1984, FitzGerald had requested an immediate Federal inspection alleging that the mines were operating without permits and were involved in pending litigation in Kentucky. FitzGerald asserts that based on his understanding and belief, the mines are within the jurisdiction of OSM, "since the combined surface effects and areas overlying underground workings exceed 2 acres and the tonnage exceeds 250 tons per annum removed for commercial sale." FitzGerald's letter further stated that the State agency had been enjoined from further proceedings against the mining companies, and noted that pursuant to 30 CFR 843.11(a)(2), surface coal mining and reclamation operations conducted by any person without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

In its letter denying FitzGerald's request, the Field Office stated that Kentucky had taken action against these operations, that a hearing on State jurisdiction was pending, and that the Office did not wish to preempt the State judicial system at that time. The letter further noted that fee compliance audits would be scheduled as soon as possible on those operations having a license to sell coal but which did not have a permit and may not have paid all the reclamation fees. However, it stated that the companies mentioned in appellant's letter were included in its list for eventual audit, and that all known operators in that category would be audited as soon as possible.

[1] Departmental regulation 30 CFR 842.11(b)(1) establishes the criteria that a citizen's complaint must meet in order to warrant an immediate Federal inspection:

(b)(1) An authorized representative of the Secretary shall immediately conduct a Federal inspection:

(i) When the authorized representative has reason to believe on the basis of information available to him or her (other than information resulting from a previous Federal inspection) that there exists a violation of the Act, this chapter, the applicable program, or any condition of a permit or an exploration approval, or that there exists any condition, practice, or violation which creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air or water resources and--

(ii)(A) There is no State regulatory authority or the Office is enforcing the State program under section 504(b) or 521(b) of the Act and Part 733 of this chapter; or

(B) The authorized representative has notified the State regulatory authority of the possible violation and within 10 days after notification the State regulatory authority has failed to take appropriate action to have the violation abated and to inform the authorized representative that it has taken such action or has a valid reason for its inaction; or

(C) The person supplying the information supplies adequate proof that an imminent danger to the public health and safety or a significant, imminent environmental harm to land, air or water resources exists and that the State regulatory authority has failed to take appropriate action. [Emphasis added.]

This regulation implements section 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982).

There can be no dispute that the criterion set forth in subsection (b)(1)(i) has been met. Subsection (b)(2) provides that an authorized representative shall have reason to believe that a violation exists if the facts alleged by the informant would, if true, constitute a condition, practice, or

violation referred to in paragraph (b)(1)(i). Departmental regulation 30 CFR 843.11(a)(2) makes it clear that a surface coal mining and reclamation operation conducted by any person without a valid surface coal mining permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm. Appellant's allegation, therefore, provided OSM with reason to believe that a violation existed.

A complaint must also satisfy the requirements of one of the three sub-paragraphs of subsection (b)(1)(ii). Subparagraph (A) does not apply because Kentucky has regulatory authority and OSM is not enforcing the State's program. Subparagraph (B) is inapplicable because the State authority was aware of the violation, and had already taken action to secure abatement of the violation by issuing cessation orders. The State, however, was precluded from enforcing the cessation orders because the Franklin Circuit Court Division II had issued an order enjoining the State Agency from further action pending a trial on the merits. Morris v. Natural Resources & Environmental Protection Cabinet, No. 84-CI-0631 (May 14, 1984). Although this injunction was lifted by that court by order dated August 8, 1984, the Kentucky Court of Appeals by order dated August 27, 1984, enjoined the State agency from interfering with "the status of the parties existing immediately prior to the entry of summary judgment" by the circuit court. Morris v. Natural Resources & Environmental Protection Cabinet, No. 84-CA-1834-1 (Ky. Ct. App. Aug. 27, 1984). <sup>1/</sup> Resolution of this appeal, therefore, depends on whether appellant's complaint satisfies the two requirements of subparagraph (C) by supplying adequate proof that (1) "an imminent danger to the public health and safety or a significant, imminent environmental harm to the land, air or water resources exists," and that (2) "the state regulatory authority has failed to take appropriate action."

Prior to April 29, 1982, appellant would have been required to offer adequate proof of actual significant, imminent environmental harm in order to trigger the requirement that OSM conduct an immediate Federal inspection. In Claypool Construction Co. v. OSM, 2 IBSMA 81, 87 I.D. 168 (1980), the Board of Surface Mining and Reclamation Appeals ruled that failure to have a State permit in and of itself did not constitute a condition, practice, or violation which caused or could reasonably be expected to cause significant, imminent environmental harm. Subsequently, OSM amended Departmental regulation 30 CFR 843.11(a)(2) to overrule this interpretation, so that surface operations conducted without a valid permit would "constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm." 47 FR 18555, 18558 (Apr. 29, 1982). The regulation allows OSM to recognize only two exceptions, neither of which is pertinent here. Thus, one effect of the change of these regulations was that Federal inspection became mandatory if a citizen alleged that an operator was mining without a permit, even though no actual harm was shown, and that the State regulatory authority had failed to take appropriate action to abate the violation.

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<sup>1/</sup> OSM filed a motion to dismiss this appeal as moot when the circuit court lifted its injunction. However, the subsequent injunction by the court of appeals renders OSM's motion baseless, so the motion must be denied.

[2] OSM contends that appellant has failed to provide adequate proof that an imminent environmental harm exists because appellant did not provide adequate proof that the operations come within the Act's jurisdiction. In particular, OSM refers to 30 U.S.C. § 1278(2) (1982) which provides that the Act shall not apply to the extraction of coal for commercial purposes where the surface mining operation affects 2 acres or less. <sup>2/</sup> Because Departmental regulation 30 CFR 701.5 requires many factors to be considered in determining the area affected by a mining operation, it is doubtful whether a citizen in all cases could lawfully obtain the needed information to provide "adequate proof" on the jurisdictional issue unless he accompanied an authorized inspector. We note that by requiring appellant to submit adequate proof that the operations are not exempt, OSM has departed from the Department's longstanding rule that one who claims an exemption from the Act must plead and prove the facts upon which the exemption turns. See Harry Smith Construction Co. v. OSM, 78 IBLA 27, 29-30 (1983), and cases cited therein. <sup>3/</sup>

Moreover, OSM's own statements in adopting the citizen complaint rules make it clear that we should avoid the strict construction OSM urges in this appeal. As OSM stated in its preamble to the regulation:

OSM is required to conduct an inspection when it has "reason to believe" that a violation exists. The basis for such a belief may or may not involve an affirmative allegation. Moreover, considering the broad language of section 521(a) of the Act, OSM inspections are necessarily "speculative" until it is determined whether or not a violation exists.

Another commenter stated that OSM must have probable cause to believe the informant's statements are true before acting under § 842.11(b) \* \* \*.

OSM disagrees. Section 842.11(b)(1)(i) requires the Secretary's authorized representative to have "reason to believe on the basis of information available to him or her" that a violation exists. This language is found in section 521(a)(1) of the Act and does not require OSM to conduct an inquiry into the veracity of the complainant.

47 FR 35627 (Aug. 16, 1982). Furthermore, when OSM amended its regulations to make operations conducted without a permit a condition or practice which

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<sup>2/</sup> OSM also refers to the finding by the Franklin Circuit Court Division II in Morris v. Natural Resources & Environmental Protection Cabinet, *supra*, slip op. at 2 (May 14, 1984), that the operators "utilized a portion of the surface, in no instance more than 2 acres, which had been previously disturbed." The fact that the operators may have used less than 2 acres is not determinative of whether the "affected area" is less than 2 acres. In determining the affected area, many things must be taken into account, including area located above underground workings. See 30 CFR 701.5.

<sup>3/</sup> Indeed, OSM recently has voiced its strenuous objection to any perceived departure from this rule. See Order of July 16, 1984, denying reconsideration of S&M Coal Co. v. OSM, 79 IBLA 350, 91 I.D. 159 (1984).

causes or can be reasonably expected to cause significant, imminent environmental harm, OSM made clear that its policy is to consider the jurisdictional question in determining whether to issue a cessation order, not determining whether to conduct an inspection:

As for the expressed due process concerns, it will be the Office's policy in implementing these regulations to refrain from issuing a cessation order until it resolves any question concerning its jurisdiction over a given operation. The Office notes that the limited circumstances which preclude its jurisdiction over a surface coal mining operation are delineated in 30 CFR 700.11, and are readily ascertainable.

47 FR 18557 (Apr. 29, 1982). The circumstances constituting an exemption are "readily ascertainable" only after an inspection. Thus, we find that it is inconsistent with the express intent of OSM's regulations to require appellant to submit proof that the operation falls within the jurisdiction of the Act.

Subsection (C) additionally requires appellant to establish that the State regulatory authority has failed to take appropriate action. OSM contends that the State regulatory authority has taken appropriate action because it issued cessation orders to the subject operations and that a trial on the merits of the case, and, thus, a determination of whether the operations are subject to the Act, is pending. Appellant contends that the State regulatory authority did not issue cessation orders but only the functional equivalent of notices of violation. Appellant contends that the State regulatory authority is unable to take appropriate action because the State remains enjoined from issuing further cease and desist orders to the companies that were the target of appellant's complaint. <sup>4/</sup>

[3] The meaning of "appropriate action" is not defined in the regulations. The preamble to the published final regulation indicates that OSM's failure to define the term was intentional. In response to a comment that OSM should specify in greater detail what "appropriate action" the State must take, OSM responded: "OSM also disagrees with the suggestion that 'appropriate action' should be spelled out in greater detail. The crucial response of a State is to take whatever enforcement action is necessary to secure abatement of the violation." 47 FR 35627-28 (Aug. 16, 1982). When a state agency has been enjoined from taking the enforcement action necessary to secure abatement of an alleged violation, it is unable to take "appropriate action" within the meaning of the regulation.

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<sup>4/</sup> The fact that the State may be taking some action against the operators does not automatically mean that the action taken is "appropriate." Where a state, acting through its regulatory agency or its courts, provides an operator with temporary relief in circumstances where this Department would lack authority to grant such relief, see 30 U.S.C. § 1275 (1982), OSM is precluded from finding that the State's action is appropriate in its consideration of a request for a Federal inspection. Two circumstances preclude a finding of appropriateness in the instant case: (1) appellant has supplied adequate proof that there is a significant, imminent environmental harm; and (2) the State courts' orders contain no finding that the operators are substantially likely to prevail on the jurisdictional issue.

[4] In the decision below and in its answer to appellant's statement of reasons, OSM suggests that its reclamation fee compliance audits constitute an alternative to conducting an inspection required by 30 CFR 842.11. 5/

In its answer to appellant's statement of reasons, OSM notes that cessation orders were issued to 10 operations during fee compliance inspections. Two of the operations that were the subject of appellant's complaint, San-Am Coal Company and Maple Creek Mining Company, were closed for failure to have mining permits. OSM believes that the other two operations are in the process of obtaining permits. The record does not make clear, however, whether any further appropriate enforcement actions against these four operations have been taken. See generally Virginia Citizens for Better Reclamation, 82 IBLA 37, 91 I.D. 247 (1984).

As a practical matter, we find nothing inherently unreasonable about OSM's approach in this appeal. However, we find nothing in the language or intent of that regulation that authorizes OSM to postpone an inspection required by that regulation until it conducts a reclamation fee compliance audit for the alleged violator. As appellant correctly points out, the clear language of the regulations at issue plainly dictates the result we reach today.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Director, Lexington Field Office, OSM, is reversed and the case remanded for immediate Federal inspections.

Gail M. Frazier  
Administrative Judge

We concur:

R. W. Mullen  
Administrative Judge

C. Randall Grant, Jr.  
Administrative Judge

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5/ Although OSM has argued in this appeal that it may properly refuse to conduct an inspection of an operation while a State court is considering whether the operation is subject to the State regulatory program, we find it difficult to reconcile this argument with OSM's willingness to assert its jurisdiction during a fee compliance inspection.

